United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1213

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

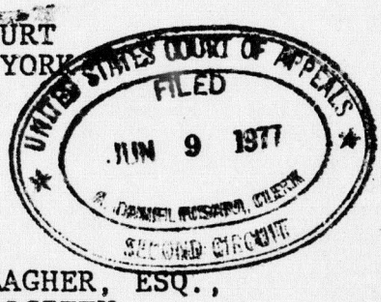
LUIS CASHMERE,

Defendant-Appellant.

Docket No. 77-1213

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- LUIS CASHMERE, Defendant-Appellant.	Docket No. 77-1213

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the Government proved beyond a reasonable doubt that appellant possessed the brown paper bag.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Edmund L. Palmieri) rendered on December 13, 1976, after a jury trial, convicting appellant Luis Cashmere of one count of possession of cocaine with intent to distribute, and sentencing him to eight years' imprisonment, to be followed by a five-year term of special parole.

A notice of appeal was filed on April 15, 1977, after the district court granted leave to file an out-of-time notice when trial counsel failed to file one (see Record on Appeal, Document No. 14, opinion of April 14, 1977).

The Legal Aid Society, Federal Defender Services Unit, was then assigned as counsel for the appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

At 8:00 a.m. on February 5, 1976, DEA Agent John Lawler was told by his supervisor to go to 116th Street (35).* Lawler

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*Numerals in parentheses refer to pages of the transcript of the trial.

jotted down the name "Luis" and the license number "608XMJ." He could not recall whether he wrote a description of the person (36).

Lawler and another DEA agent, Richard Bell, testified that on February 3, 1976, between 9:00 a.m. and 1:00 p.m., they were watching a black 1973 Chrysler with license number 608XMJ parked on the east side of Third Avenue between 115th and 116th Streets (21-22, 81). Agent Moran was also on surveillance from 9:00 a.m. (130), and joined Lawler later in the morning (23). Lawler said he was looking for a Hispanic male, about five feet, nine inches tall, and wearing a dark coat and slacks and a hat (46). Lawler said that the description alone was not good enough to stop anyone unless he approached the car (47). Bell said he was looking for a man who had previously been described (92).

For a few minutes during the morning, Lawler did not have the car in view, since he was driving around to change positions (23). Similarly, Bell did not have the car under continuous observation. For two brief periods, he had walked two blocks north (95) to speak with a person who had provided information (88). Moran testified that he saw Bell speak with an informant (137).

Appellant Cashmere approached the car at about 1:05 p.m., got into the vehicle, and started the motor. Lawler, in his car, drove alongside appellant and stopped. Lawler displayed his badge, told appellant he was a federal agent, and asked him

to step out of the car (24). Appellant did not step out. Lawler took out his gun (58), opened the car door, turned off the motor, and repeated his request that appellant leave the car (24).

As appellant was stepping from the car, Lawler "helped" him by putting his arm firmly across appellant's chest (62). According to Lawler and Bell, at the same time appellant was getting out of the car, he kicked or "nudged" with his foot (120) a brown paper bag out of the well of the front of the car into the street, and then tried to kick the bag under the car. Lawler picked up the bag, opened it, and saw that it contained a clear plastic bag with white powder, later shown to be cocaine. Appellant was then arrested (25, 60, 61; see also 83).*

Lawler and Moran tried to handcuff appellant and place him in the government car. According to Lawler and Moran, appellant struggled and was yelling, and had to be dragged into the agents' car (26). In the course of the struggle, appellant's clothing was torn (67) and his lip was bleeding (133). The agents testified that they may have hit him in the struggle (134).

Lawler testified that he saw two young women as he was putting appellant into the government car (74). Bell testified that a young woman asked who the agents were and where they were taking appellant (89, 125).

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*It was stipulated that a government chemist would testify that the white powder was 267.8 grams of cocaine hydrochloride, 24.4% pure (157).

In the government car, appellant, sitting in the back seat, tried to get the window open (27). Moran, with appellant in the back seat (147), testified that he saw appellant trying to throw a brown paper bag out of the window. The bag contained Agent Lawler's lunch (135).

Lawler described how cocaine is used. He explained that the user would inhale a small portion, about a gram in weight. He stated that a "coke spoon" was a spoon with a small cup at the end, holding about one small fingernail of cocaine (31).

At the close of the Government's case, counsel made a motion for a judgment of acquittal. The motion was denied (157).

Testifying for the defense was Antonia Perez. She said that she was with appellant and that they had been drinking. She said she had been up all night. They had left the club and were going to the car so that appellant could drive her home (163). Appellant opened the unlocked car door (164) and, as he was getting into the car, someone came up to him and hit him in the mouth (159). A man who said he was a police officer told Perez to go away (160).

Over the objection of counsel, the photograph of appellant taken at the time of his arrest was introduced into evidence to show how much hair he had on his head (178). The hair was disheveled (181). However, Bell testified that appellant was bald on top and that he combed the side of his hair up (181).

In his charge to the jury,* Judge Palmieri stated:

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*The complete text of the judge's charge is C to the separate appendix to appellant's brief.

The essential elements to which I refer are the following: First, that on or about February 5, 1976, the defendant possessed with intent to distribute a narcotic controlled substance.

Second, that he did so unlawfully, intentionally and knowingly.

And third, that the substance in Government's Exhibit 1, which is in evidence, is in fact a narcotic controlled substance.

I would like to say a few further words on these elements. You will note that the first element of the offense is possession with intent to distribute the drug. What does that phrase mean? To start off, the word "deliberate" means the actual, constructive or attempted transfer of the drug and the word "possess" has its common, everyday meaning, that is to have something within your control. And finally, the word "intent" refers to a person's state of mind. So the term "possess with intent to distribute" can be fairly stated to mean: to control an item with the state of mind or purpose to transfer that item.

On this element, the government contends that it has proved beyond a reasonable doubt that Luis Cashmere knowingly possessed the drug, and that at the time he possessed it his mental state was such that he would transfer it to someone else.

(Appendix C at 212-213).

ARGUMENT

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT POSSESSED THE BROWN PAPER BAG.

The only evidence connecting appellant to cocaine found in the street was the testimony of the agents that appellant had kicked a brown paper bag out of the front of the car. No other proof concerning the paper bag or appellant was presented to the jury. This evidence failed to sustain the Government's burden of proving beyind a reasonable doubt that appellant either physically or constructively possessed the brown paper bag. United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

Possession must be either physical or constructive. In this case there was neither type of possession. For appellant to have had physical possession, he had to have dominion and control of the bag -- some meaningful nexus to it. "Mere touching" was not possession. See United States v. Minieri, 303 F.2d 550, 551 (2d Cir. 1962); cf. Fitzpatrick v. United States, 410 F.2d 513 (5th Cir. 1969). Appellant's kicking or nudging of the brown paper bag was his only physical contact with the bag. This conduct demonstrated no physical control over or nexus with the bag. Indeed, the kicking came after appellant was in the custody of the three agents who had approached him. One, with a gun drawn, had grabbed him firmly about the chest, and was "helping" him out of the car. The evidence

shows that what the agents called "kicking" could have been an accidental touching of the bag by appellant's foot as he was dragged from the car. There could not be any control by appellant over the bag at that moment, and none had previously been seen by the agents.

The kicking of the bag is, at most, evidence of a reaction to the agents' conduct, which alone does not establish control. United States v. Kearse, 444 F.2d 62 (2d Cir. 1971); see also United States v. DiStephano, Doc. No. 76-1581, slip op. 3539, 3557 (2d Cir., May 16, 1977); United States v. Johnson, 513 F.2d 819, 824 (2d Cir. 1975).

Nor was there proof of constructive possession. There was no proof that appellant had the power to sell, dispose of, deal with, or even physically possess the bag. United States v. Infanti, 474 F.2d 522 (2d Cir. 1973); United States v. Kearse, supra; United States v. Febre, 425 F.2d 107 (2d Cir. 1970); United States v. Jones, 308 F.2d 26, 30 (2d Cir. 1962).

There was no other information available to the jurors for determining that appellant's mere act of kicking the bag could permit a finding of possession. Appellant's mere presence in the car from which the bag came is insufficient to establish possession. United States v. Romano, 382 U.S. 136, 141 (1965); United States v. Kearse, supra; see also United States v. Singleton, 532 F.2d 199, 203 (2d Cir. 1976).

In addition, there was no proof that appellant owned the car which the agents were watching. The uncontradicted testimony

of Ms. Perez was that appellant was to drive her home after they had several drinks together. Appellant may have been driving a car not belonging to him for the very purpose of taking Ms. Perez home. See United States v. DiNovo, 523 F.2d 197 (7th Cir.), cert. denied 96 S.Ct. 449 (1975). Indeed, the agents confirmed that a young woman, apparently Ms. Perez, was at the scene of the arrest and was concerned about appellant and where he was being taken.

There was no testimony in the record that appellant brought the bag into the car with him or that he had placed the bag in the car previously. Further, although appellant did have the keys to the ignition, the car door was unlocked. Also, the agents testified that there were times during the four-hour surveillance during which they did not have the car in view. These circumstances preclude any inference from the mere kicking that appellant had a connection with the bag. On the record here, Ms. Perez or someone else could have put the bag in the car. These facts are thus comparable to those in Guevara v. United States, 242 F.2d 745 (5th Cir. 1957). In Guevara, two people were found in a previously unlocked vehicle. A bag of marijuana cigarettes was found under the front seat. One of the occupants was allowed to leave the scene; the other was arrested. The court reversed the judgment, saying that presence in the car was not enough to establish possession of a bag which might have been placed in the car by the person who was not arrested or, since the car was unlocked, someone

else altogether.

Since the Government failed to establish beyond a reasonable doubt that appellant had dominion and control over the brown paper bag, the conviction must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the indictment dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 9, 1977

I certify that a corrected copy of this brief [redacted] has been mailed to the United States Attorney for the Southern District of New York.

Robert S. Bailey